SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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TCR SPORTS BROADCASTING HOLDING, LLP,

Petitioner,

- v -

WN PARTNER LLC, NINE SPORTS HOLDING LLC, WASHINGTON NATIONALS BASEBALL CLUB, LLC, THE OFFICE OF COMMISSIONER OF BASEBALL, ALLAN H. (BUD) SELIG, AS COMMISSIONER OF MAJOR LEAGUE BASEBALL, THE BALTIMORE ORIOLES BASEBALL CLUB, BALTIMORE ORIOLES LIMITED PARTNERSHIP

Respondents.

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INDEX NO. 652044/2014

MOTION DATE 04/19/2019

MOTION SEQ. NO. 022

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 022) 783, 784, 785, 807, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 906, 908, 909, 910, 911

were read on this motion to CONFIRM ARBITRATION AWARD.

In many cases, arbitration is a quick and efficient way to resolve disputes with little or no court involvement. *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, 559 U.S. 662 (2010). This is not one of those cases.

This is a dispute between the Washington Nationals Baseball Club ("the Nationals") and the Baltimore Orioles Baseball Club ("the Orioles") and related entities regarding the division of television revenues and profits through their jointly owned television network MASN. As required by their contract, the teams submitted the dispute for resolution by Major League Baseball's Revenue Sharing Definitions Committee ("RSDC") in January 2012.[1]

The RSDC issued its decision two years later. It was promptly challenged in court by the Orioles. After three years of litigation, the arbitration award was vacated on the ground that the law firm that represented the Nationals in the arbitration concurrently represented Major League Baseball (MLB) and the three arbitrators' teams in other matters, resulting in "evident partiality." The Orioles' request to have the second arbitration shifted to a *non*-MLB tribunal was denied. Then came another year of arbitration with a different RSDC panel, which rendered an award that was nearly identical in dollar terms to the first one five years earlier.

And now, more than seven years after the arbitration process began, the parties are back in litigation. The Nationals (again) ask the Court to confirm the RDSC arbitration award. In response, the Orioles (again) ask the Court to vacate the award on the ground of MLB and RSDC bias and remand for a *third* arbitration before a non-MLB arbitration panel. With a nod to Yogi Berra, it's like déjà vu all over again.

For the reasons that follow, the Court grants the Nationals' motion, confirms the RSDC's award, and terminates this proceeding.

[1] For convenience, the Orioles-related and Nationals-related entities will be referred to in this opinion collectively as the "Orioles" and "Nationals," respectively, except where it is relevant to distinguish among them.

BACKGROUND

The facts of this case have been recounted in prior decisions. *See TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC*, 2015 WL 6746689 (Sup. Ct. N.Y. Cty. Nov. 4, 2015) ("TCR I") (vacating first arbitration award), *aff'd* 153 A.D.3d 140 (1st Dep't 2017) ("TCR II"), *appeal dismissed* 30 N.Y.3d 1005 (2017). They will be summarized below only as necessary to explain the Court's decision resolving the present motion.

The 2005 Agreement

The story begins in 2005, when the Montreal Expos (then owned by MLB) were relocated to Washington, D.C. and renamed the Nationals. The move aggrieved the nearby Orioles, whose fan base and exclusive television viewing rights extended to Washington D.C. and its environs. To address the Orioles' concerns, MLB, the Orioles, and the Nationals (and related entities) entered into an agreement dated March 28, 2005 ("2005 Agreement"). The Nationals' current owners purchased the team from MLB in 2006 and assumed all of the agreement's terms.

In a nutshell, the parties agreed that a jointly-owned regional sports network (Mid-Atlantic Sports Network or "MASN") would have exclusive broadcast rights to all available Orioles and Nationals games to viewers in Maryland, Virginia, Delaware and the District of Columbia, and certain counties in West Virginia, Central Pennsylvania and Eastern North Carolina. NYSCEF 814 at 1. The agreement gave the Orioles supermajority ownership and management control of MASN. *Id*. § 2. The Nationals received a minority equity stake in MASN, starting at 10% and growing by 1% per year after 2010 to a maximum of 33%. *Id*. § 2.N. "This allocation would allow the Orioles to receive reparative compensation through the

distribution of profits in accordance with its then-applicable supermajority interests." *TCR II*, 153 A.D.3d at 144.

The 2005 Agreement provided a fixed schedule of annual fees that MASN would pay the Nationals from 2005 through 2011 for the right to broadcast Nationals games. NYSCEF 814 § 2.H. Beginning with the 2012 season, MASN must pay rights fees to the Nationals at "fair market value," to be determined for each five-year period beginning with 2012-2016. *Id*. § 2.J. As a practical matter, the agreement provides an economic incentive for the Orioles to minimize these rights fees, thus maximizing MASN's profits (of which they take the lion's share), and the Nationals' incentives run in the other direction.

The 2005 Agreement provides a three-step mechanism for resolving disputes between the Nationals and MASN over the fair market value of the rights fees: first negotiation, then mediation, and finally arbitration before the RSDC, which is a standing committee composed of MLB club owners and executives that regularly determines the market value of broadcast rights fees for purposes of MLB's revenue-sharing plan. *Id*. § 2.J. In determining the fair market value of the Nationals' rights fees, the RSDC is to apply "the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." *Id*.

The First Arbitration

The parties were unable to agree upon a fair market value for the Nationals' telecast rights for the years 2012-2016. They jointly waived the mediation portion of the dispute resolution process and proceeded directly to arbitration before the RSDC in January 2012. At the time, the RSDC was made up of executives of the Tampa Bay Rays, Pittsburgh Pirates, and New York Mets. NYSCEF 784 at 4. The Nationals were represented in the proceedings by the law firm Proskauer Rose LLP. Concurrently, Proskauer represented MLB and the RSDC

arbitrators' teams (and other teams) in unrelated matters. The Orioles complained about the perceived partiality, to no avail. *TCR I* at *9.

In the arbitration, the Orioles asserted that the average annual fair market value of the Nationals' broadcast rights for 2012-2016 was "roughly $34 million." The Nationals asserted that the annual average was "roughly $109 million." NYSCEF 817 at 2.[2] The RSDC evaluated the methodologies proposed by the Orioles (primarily based on MASN's projected revenues and expenses) and the Nationals (primarily based on comparable transactions) and decided that neither approach captured fully the RSDC's established methodology. The RSDC concluded that its established methodology required "(i) conducting a pro forma analysis of MASN (which involves projecting MASN's revenue and expenses to determine an appropriate rights fee), (ii) considering comparable local rights fee agreements for purposes of verifying the pro forma analysis, and, (iii) evaluating other factors raised by the parties in the proceeding that may impact the value of the local broadcasting rights of the Nationals." NYSCEF 817, the "First Award," at 8.

The RSDC reached a decision in mid-2012 but withheld issuing the final award while the parties engaged in settlement discussions, which proved unsuccessful. *TCR I* at *3 n.6. During the negotiation period, MASN was paying the Nationals based on the Orioles' proposed annual fees, which were substantially lower than the amounts the parties understood the RSDC was planning to award. To facilitate settlement discussions, MLB and the Nationals entered into an agreement whereby MLB would advance the Nationals approximately $25 million as "make

[2] In the RSDC's second arbitration award in 2019 (discussed below), the panel indicated that the numbers proposed by the parties at the *first* arbitration hearing were instead $39.5 million and $118 million, respectively. NYSCEF 813 at 6. The difference is not material to this decision.

whole" payments with respect to 2012 and 2013 rights fees, to be repaid from the anticipated RSDC award or a potential sale of MASN to Comcast. *Id.* at *4, *8-*9; NYSCEF 848.

In the end, the RSDC determined that each side had overstated its position. Its final award, issued on June 30, 2014, valued the Nationals' rights at an average of approximately $59.6 million per year over the 2012-2016 period. (First Award at 19.)

The First Litigation

MASN and the Orioles initiated a proceeding in this Court three days later, on July 2, 2014, seeking an order pursuant to CPLR § 7511 and Section 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10, vacating the First Award.

After limited discovery followed by substantial briefing and argument, Judge Marks rejected most of the grounds raised by the Orioles in support of vacating the First Award. Of particular relevance here, he found that: (i) the RSDC's "extensive explanation of their determination of the appropriate methodology to apply" in valuing the Nationals' broadcast rights was "more than sufficient" to uphold the result on its merits (*TCR I* at *6); (ii) MLB did not improperly control or influence the arbitration process or usurp the RSDC's decision making role (*id*. at *7); and (iii) MLB's $25 million loan to the Nationals did not give it an improper financial stake in the outcome of the arbitration or otherwise indicate it was biased in favor of the Nationals. *Id*. at *8-*9. However, Judge Marks found that the First Award *should* be vacated because Proskauer's concurrent representation of the Nationals, MLB, and the arbitrators' teams created "evident partiality." *Id*. at *9-12.

The Orioles requested that the second arbitration be referred to "a panel of neutral arbitrators that is not subject to Baseball's corrupting influence, such as a panel convened under the auspices of the American Arbitration Association." Judge Marks denied that request, finding

that "re-writing the parties' Agreement [which calls for RSDC determination] is outside of [the Court's] authority." *Id*. at *13 n. 21.

On appeal, the First Department unanimously affirmed Judge Marks' decision that the First Award should be vacated. *TCR II* at 143 (*per curiam*). Justice Andrias (in a plurality opinion joined by Justice Richter) agreed with Judge Marks that vacatur was required due to Proskauer's role in the process. *TR II* at 153-54. Justice Kahn (concurring) "agree[d] that Supreme Court correctly vacated the [First Award] based on evident partiality." *Id*. at 162. Presiding Justice Acosta (joined by Justice Gesmer) dissented only on the ground that the parties should have been remanded to a non-MLB panel for their second arbitration. The opinions did not address whether the Orioles' other asserted grounds for relief – *e.g.*, MLB's role in the process and its loan to the Nationals – warranted vacating the award.

The panel splintered on the question whether the second arbitration should be heard by the RSDC or, as requested by the Orioles, by a panel of independent, non-MLB arbitrators. It was in that context that the plurality and the dissent delved into the Orioles' arguments beyond the Proskauer issue. Specifically, the plurality found that the grounds asserted by the Orioles in support of vacatur did not warrant deviating from the parties' chosen arbitration forum (the RSDC), given that Proskauer would be out of the picture in a subsequent arbitration. *Id*. at 160. It stressed that the parties were aware when they signed the 2005 Agreement that disputes would be resolved by an MLB committee, not an "independent" panel. It also rejected the Orioles' argument that MLB's $25 million loan to the Nationals created an improper financial interest in the resolution of the arbitration, especially since the Nationals offered to post a bond for repayment of the loan. *Id*. at 158. Justice Kahn reached the same conclusion, but on the ground (as Judge Marks had found) that the court did not have authority to do otherwise. Her opinion

included only a general statement that the "conduct of Major League Baseball and its representatives has been far from neutral and balanced." *Id*. at 161. The two dissenting Justices disagreed, finding that MLB and the RSDC created an atmosphere of unfairness so pervasive that it required not only vacating the award but also remanding to a non-MLB arbitration panel. *Id*. at 162-81.

In sum, the First Department held that: (i) Proskauer's role in the arbitration required vacatur of the First Award; and (ii) the second arbitration should proceed before the RSDC rather than a non-MLB forum. As noted above, the court did not address the branch of Judge Marks' decision that rejected the Orioles' other arguments as grounds for vacating the First Award, leaving that portion of the decision intact though without the imprimatur of the appellate court.[3]

[3] The Nationals go too far when they suggest that the First Department affirmed Judge Marks on every issue relevant to the present motion. *E.g.*, Reply Brief, NYSCEF 906, at 2, 5, 10. While one might stretch to read the court's one-paragraph *per curiam* affirmance to implicitly incorporate every one of Judge Marks' alternative holdings, the Court does not think it appropriate to do so here (if it ever is), particularly given that there were three opinions taking different positions on different issues. To be sure, the plurality opinion can be read as expressing broad agreement with Judge Marks rationale on all fronts, but it does so largely in the context of deciding the appropriate forum for the second arbitration. At the other extreme, Justices Acosta and Gesmer clearly disagreed with significant portions of Judge Marks' reasoning, though again in the context of deciding whether the RSDC was the proper forum for a second arbitration. And Justice Kahn did not address any of the Orioles' individual grounds for relief, other than a general reference to partiality in the process, and thus cannot be said to have adopted Judge Marks' findings *in toto*. In the end, the only binding holdings of the First Department were that Judge Marks properly granted the Orioles' motion to vacate the First Award and that he properly denied the Orioles' motion to require the parties to arbitrate their dispute before a non-MLB panel. *TCR II* at 142 (*per curiam*).

The Second Arbitration

The Nationals were represented in the second arbitration by different counsel (Quinn Emanuel) and the RSDC panel was made up of executives of three different teams (the Milwaukee Brewers, Seattle Mariners, and Toronto Blue Jays).

On February 9, 2018, prior to the commencement of the arbitration, MLB and the Nationals reached an agreement under which the Nationals agreed to repay in full (with interest) the $25 million advance that MLB had provided to the Nationals in connection with the first arbitration proceeding. NYSCEF 821 (the "Loan Prepayment Agreement"). The agreement provided that the lump sum payment would be made no less than ten business days before the RSDC commences a hearing and would be held in escrow until commencement of the hearing.

The Loan Prepayment Agreement further provided that if the arbitration hearing did not commence within 14 days of its scheduled commencement (a date that had not yet been set), the lump sum payment would be returned to the Nationals. *Id*. The agreement does not by its terms amend the original loan agreement between MLB and the Nationals or otherwise provide that the return of the lump sum payment, if it occurred, would relieve the Nationals of its obligation to repay the loan per its original terms. Nevertheless, the Orioles contend that the Loan Prepayment Agreement gave MLB a financial incentive to ensure that the RSDC scheduled the hearing promptly and did not recuse itself (as the Orioles had urged it to do) because a delay in the arbitration would have required MLB to return the Nationals' lump sum payment.

The arbitration hearing was held on November 15-16, 2018. It included opening statements, sworn witnesses, direct and cross-examination of fact and expert witnesses, closing arguments, and written post-hearing submissions. The spread between the parties' positions with respect to the average annual fair market value of the Nationals' broadcast rights had narrowed

substantially from the first proceeding, but they continued to assert that different methodologies should apply.

The RSDC issued its written decision (the "Second Award") on April 15, 2019. NYSCEF 813. The 48-page decision is extraordinarily detailed and thorough. The panel first grappled with the parties' conflicting views as to the "established methodology" for valuing the broadcast rights. The Orioles still favored a "bottom up analysis that calculates license fees based on the income statement of MASN, while assuming a specific operating margin and specific percentages of revenue and expenses attributable to baseball." The Nationals, on the other hand, still "favor[ed] an analysis placing considerable weight on comparable teams and deals." *Id*. at 2. After an exhaustive analysis of the extrinsic evidence offered by both parties as to the meaning of "established methodology," which the panel concluded was an ambiguous term, the RSDC determined that the proper methodology includes an analysis of comparable transactions *and* a bottom-up analysis. *Id*. at 29.

The RSDC proceeded to dissect the arguments made by the parties and their witnesses regarding the application of the methodology to the facts of the case. As to the "bottom up" method, the RSDC assessed the parties' evidence and arguments regarding the percentage of MASN's revenues and expenses attributable to baseball and the appropriate margin to apply to MASN, based in part on the RSDC members' substantial experience in the industry. That analysis yielded an average annual value of the broadcast rights of approximately $61.9 million. *Id*. at 37. As to the "comparable teams" approach, the RSDC undertook a similarly comprehensive analysis of the parties' evidence and arguments. It concluded that the average annual value under this approach was approximately $56.9 million, rather than the $95 million proposed by the Nationals. *Id*. at 46.

In the end, the RSDC determined that "[b]ecause the Committee's two numerical analyses yielded such similar results, the . . . most appropriate measure of fair market value is the average of the two—the license fees produced by its bottom-up analysis and its comparable teams analysis." That analysis yielded an average annual value of approximately $59.4 million, which is the amount the RSDC concluded constituted the "fair market value" of the telecast rights. *Id*. at 47-48. The Orioles, predictably, cite the similarity between Second Award (average of $59.4 million) and the First Award ($59.6 million) as evidence that the second arbitration was infected by the same "evident partiality" as the first. The Nationals, of course, see it the other way.

The Second Litigation

On April 15, 2019, the same day the Second Award was issued, the Nationals moved in this Court to confirm the arbitration award. NYSCEF 783. The Orioles opposed the motion and ask the Court to vacate the Second Award and remand the parties for a third arbitration in a non-MLB forum.

The Nationals' position is relatively straightforward. They argue that because the sole ground for vacating the First Award (*i.e.*, Proskauer's role as counsel) has been eliminated, the Court should summarily confirm the award. They dismiss the Orioles' arguments in opposition as a rehash of arguments previously rejected by Judge Marks and the First Department.[4]

The Orioles advance five main arguments in support of its position that the Second Award should be vacated. Specifically, they argue that: (i) the "secret" Loan Prepayment Agreement improperly gave MLB a financial stake in the arbitration, which created "evident

[4] *See* n. 3, *supra* (rejecting the Nationals' argument that the First Department affirmed Judge Marks' decision with respect to all of the Orioles' arguments).

partiality" and rendered the arbitration fundamentally unfair; (ii) the RSDC acted with evident partiality by failing to disclose MLB's role in the arbitration or RSDC's communications with MLB; (iii) MLB and the RSDC denied them the right to present their case by refusing to disclose post-2005 Agreement communications but then relying on such communications in the award, and by refusing to disclose all of their evaluations of related-party telecast agreements for the 2012-2016 period; and (iv) the RSDC exceeded its powers under the 2005 Agreement by failing to properly follow Maryland law with respect to the interpretation of a contract.

Next, the Orioles request (as they did in the first litigation) that the Court order a rehearing of the dispute in an independent forum – that is, not the RSDC. Their argument essentially is that the unfairness predicted by the dissent in *TCR II* has come to pass, and that there have now been *two* biased and unfair arbitrations, which they contend warrants finding that the next arbitration should be heard in an independent forum.

Finally, the Orioles dispute the Nationals' contention that if the Second Award is confirmed, the Nationals will be entitled to recover prejudgment interest and, if so, they dispute the amount.

LEGAL ANALYSIS

1. The Court's Review of the Second Award is Narrowly Circumscribed

Under the Federal Arbitration Act ("FAA"), "any party to the arbitration may apply to the court . . . for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated . . . as prescribed in [FAA §] 10." 9 U.S.C. § 9. The Nationals' motion is brought under that provision of the FAA.

Under Section 10 of the FAA, a court may vacate an arbitration award: "(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality

or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a).

The Court's role in reviewing an arbitration award is tightly constrained. As the Court of Appeals stated in a seminal decision in this area: "It is well settled that judicial review of arbitration awards is extremely limited. An arbitration award must be upheld when the arbitrator 'offer[s] even a barely colorable justification for the outcome reached.' Indeed, we have stated time and again that an arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice." *Wien & Malkin LLP, v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 479-80 (2006). "[A]n arbitrator's rulings, unlike a trial court's, are largely unreviewable." *In re Falzone (New York Cent. Mut. Fire Ins. Co.)*, 15 N.Y.3d 530, 534 (2010).

In rare circumstances, an arbitration award may be vacated if the award exhibits a manifest disregard of the law, but this "is a doctrine of last resort limited to the rare occurrences of apparent 'egregious impropriety' on the part of the arbitrators, 'where none of the provisions of the FAA apply.' The doctrine of manifest disregard, therefore, 'gives extreme deference to arbitrators.' . . . To modify or vacate an award on the ground of manifest disregard of the law, a court must find 'both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.'" *Wien & Malkin*, 6 N.Y.3d at 480-81. Notably,

"[m]anifest disregard of the *facts* is not a permissible ground for vacatur of an award." *Id*. at 483 (emphasis added).

In a case involving a contract, such as this one, "the manifest disregard standard does not permit review of the panel's interpretation of the parties' agreement even if that interpretation was erroneous." *Cantor Fitzgerald Secs. v. Refco Secs., LLC*, 83 A.D.3d 592 (1st Dep't 2011) (citation omitted). Showing "manifest disregard" in that context is a "heavy burden." An arbitral decision must be upheld unless the tribunal "did not even 'arguably' interpret the parties' . . . agreement in rendering his award." *Abell v. JetBlue Airways Corp.*, 134 A.D.3d 476, 477 (1st Dep't 2015) (citing *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569-571 (2013)); *see also, e.g., New York City Transit Auth. v. Transp. Workers' Union of Am., Local 100, AFL-CIO*, 6 N.Y.3d 332, 336 (2005) ("[C]ourts are obligated to give deference to the decision of the arbitrator. This is true even if the arbitrator misapplied the substantive law in the area of the contract.") (citations and quotations omitted); *T. Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010) (the manifest disregard standard "essentially bars review of whether an arbitrator misconstrued a contract.").

In sum, "'[a] party moving to vacate an arbitration award has the burden of proof, and the showing required to avoid confirmation is very high.'" *U.S. Elecs., Inc. v. Sirius Satellite Radio, Inc.*, 17 N.Y.3d 912, 915 (2011) (quoting *Ecoline, Inc. v. Local Union No. 12 of lnt'l Ass'n of Heat & Frost Insulators & Asbestos Workers, AFL-CIO*, 271 F. App'x 70, 72 (2d Cir. 2008)). Here, the Orioles have not met that burden.[5]

[5] The parties did not seek discovery in connection with the Nationals' pending motion to confirm the award. *Compare TCR I* at *5 (noting that the parties engaged in limited discovery in connection with the motion to vacate the First Award.).

2. There Are No Legitimate Grounds to Vacate the Second Award

a. The Orioles Have Not Established "Evident Partiality"

An arbitration award may be vacated "where there was evident partiality or corruption in the arbitrators, or either of them." 9 U.S.C. § 10(a)(2). "To vacate an award because of evident partiality under the FAA (9 USC § 10 [a] [2]), the movant bears the burden of showing that a reasonable person, considering all the circumstances, would *have to conclude* that an arbitrator was partial to one party to the arbitration. . . . Although this requires 'something more than the mere appearance of bias,' '[p]roof of actual bias is not required.' Rather, a finding of partiality can be inferred 'from objective facts inconsistent with impartiality.'" *TCR II* at 150-51 (emphasis added; citations omitted). In vacating the First Award, the First Department focused on MLB's and the RSDC's failure to disclose the various relationships each had with the Proskauer attorneys who represented the Nationals in the arbitration. *TCR II* at 151-53.

The Orioles' arguments with respect to "evident partiality" in the Second Award pale in comparison to the inexplicable choice by the Nationals to employ Proskauer, and the MLB's and RSDC's decision to permit it, and their collective failure to fully disclose the relevant facts. The Orioles' current arguments here are, as the Nationals assert, rehashed versions of arguments that were rejected by Judge Marks and not disturbed on appeal.[6]

i. The Loan Prepayment Agreement

The Orioles' primary argument for vacating the Second Award is that the "secret" Loan Prepayment Agreement between MLB and the Nationals "created a glaring conflict of interest and evident partiality with respect to the RSDC's decision" not to recuse itself. The Orioles

[6] Even if Judge Marks' decision is not deemed to be binding law of the case with respect to those arguments, the Court independently finds his analysis to be persuasive as to the closely analogous issues presented here.

contend that, under the agreement, a recusal by the RSDC would have forced MLB to return the $25 million lump sum payment to which it was entitled under the agreement. This argument boils down to a renewal of the argument that the original $25 million loan was improper (rejected by Judge Marks and the plurality opinion on appeal), though without the benefit of the most persuasive portion of the argument – *i.e.*, that the loan gave MLB a financial interest in the *outcome* of the arbitration. *TCR II* at 162 (Acosta, J. dissenting in part) (MLB "made a bet on the outcome of the arbitration by loaning one of the parties $25 million to be repaid after an award in that party's favor").

First of all, it was not a secret agreement. The Orioles were told about the Loan Prepayment Agreement one month after it was signed, and eight months before the arbitration hearing took place. By contrast, the full extent of Proskauer's conflicting relationships in the first arbitration did not come to light until discovery took place on the motion to vacate the First Award. *TCR II* at 151-52.

Second, the Loan Prepayment Agreement if anything *alleviated* the substantive concerns expressed by the Orioles in connection with the First Award – *i.e.*, that the loan purportedly gave MLB a financial stake in the *outcome* of the arbitration. Judge Marks found that there was no reason to believe that the Nationals would be unable to repay the loan. *TCR I* at *8. Moreover, in replying to the dissent's concern that MLB would only recoup its $25 million advance if the Nationals prevail in the RSDC proceeding, the First Department plurality noted that the "Nationals have offered to post a bond to guarantee repayment of the advance to MLB regardless of the outcome of the arbitration." *TCR II* at 157-58. The Loan Prepayment Agreement does that one better. Under the agreement, MLB would be fully repaid *before* the second arbitration, removing any lingering concerns that MLB might have a financial interest in the outcome.

Third, the harm the Orioles claim they suffered from the Loan Prepayment Agreement was that it provided some (albeit, not much as discussed below) financial disincentive for the RSDC to recuse itself from the arbitration. Fundamentally, this is a rehash of the argument made in connection with the first litigation that the RSDC should be recused from hearing the second arbitration. That argument was rejected in *TCR I* and *TCR II*, in which both courts concluded that the RSDC was not only an appropriate forum to hear the dispute, it was in fact mandated to be the forum under the 2005 Agreement.[7] Indeed, the 2005 Agreement does not even refer to "arbitration" in connection with disputes with respect to rights fees. It simply says, in a paragraph titled "Appeal," that such disputes "*shall be determined by the [RSDC]* using the RSDC's established methodology for evaluating all other related party telecast agreements in the industry." NYSCEF 814, § 2.J (emphasis added).

By contrast, the general "Dispute Resolution" section of the 2005 Agreement, which specifically is *not* applicable to disputes with respect to rights fees, provides for mediation "under the auspices of either the American Arbitration Association or JAMS." *Id.* § 8.A. If mediation is unsuccessful, such disputes "shall be arbitrated" before the MLB Commissioner. Notably, if MLB had an ownership or financial interest in the Nationals at the time the dispute arose, the agreement provides that a dispute between MLB and the Orioles "shall be arbitrated before a three-person panel in accordance with the Commercial Rules of the American

[7] The Orioles suggestion that *TCR I* and *TCR II* did not preclude the RSDC from recusing itself is beside the point. While it is accurate, the Orioles ignore the fact that the RSDC did consider and reject the argument that it should recuse itself. In addition to citing the First Department decision, the RSDC evaluated in detail the facts relevant to recusal and concluded that there were no grounds for recusal. NYSCEF 873. While there could be extreme cases in which the Court would not accept a tribunal's self-evaluation of its own manifest conflicts of interest, this is not such a case. The Orioles' case for recusal was thin and speculative. In addition, the Court rejects the suggestion made by the Orioles that prior Court rulings are irrelevant to the RSDC's assessment of whether it should recuse itself.

Arbitration Association," subject to various other requirements. The parties clearly knew how to provide for an "independent" arbitration forum when that was their intention. They did not do so with respect to disputes over rights fees, which they agreed "shall be determined" by RSDC, full stop.

Finally, the Loan Prepayment Agreement does not create the threatened financial forfeiture that the Orioles suggest created a "glaring" conflict of interest. Even if the agreement led to a precipitous scheduling of the arbitration, which it clearly did not (indeed it was delayed for months at the Orioles' request and over the Nationals' objection, without triggering the prepayment provision), there is nothing in the Loan Prepayment Agreement to suggest that MLB could "lose $25 million" if the RSDC decided to recuse itself from the arbitration. At most, MLB would lose the benefit of receiving a lump sum payment rather than being repaid under the original terms of the loan. While receiving repayment more quickly obviously has some value, the Orioles' significantly overstate the notion that it could provide the type of bias that would warrant vacating the Second Award. Moreover, the impact of any such loss on the RSDC members, who represent only three of thirty MLB teams, is highly diluted. The Nationals also argue persuasively that there was a legitimate business reason for providing that the lump sum payment would have to be returned if the RSDC hearing was delayed substantially. Without some right to recall the cash in the event of a substantial delay in commencing the scheduled arbitration, the Nationals would be out of pocket the entire amount of the repayment for an indefinite period of time. NYSCEF 906 at 8-9. Such an arrangement would have undermined the very purpose of the loan, which was to facilitate negotiations by advancing funds to tide the Nationals over while the dispute was resolved.

Against that backdrop, the notion that any purported indirect and modest financial interest there might be in receiving a lump sum payment in connection with repayment of the Nationals' debt, in order to dissuade the RSDC (who came from three of thirty MLB teams) from recusing itself despite two court decisions finding that it did not have to do so, does not come close to satisfying the heavy burden of proving evident partiality.

ii. Failure to Disclose MLB's Role or Communications

Next, the Orioles claim that there was evident partiality because the RSDC "fail[ed] to disclose either MLB's role in the second arbitration or MLB's communications with the RSDC about the arbitration's subject matter, which it claims would show that MLB "has clearly and publicly prejudged the merits of this dispute." NYSCEF 860 at 14. Again, this is a repackaged version of arguments that were soundly rejected by Judge Marks.

The 2005 Agreement expressly mandates that disputes regarding telecast rights would be resolved by the RSDC, which all parties understood is composed of *MLB-chosen* executives from other MLB teams – that is, "industry insiders, with specialized expertise." *TCR II* at 160 (plurality); *see also id*. at 162 (Kahn, J., concurring) ("Here, the conduct of Major League Baseball and its representatives has been far from neutral and balanced. But this was the forum the parties chose, even avoiding the opportunity for a hearing before a panel of the American Arbitration Association and proceeding directly to the [RSDC]."). Moreover, based on a record replete with evidence of MLB's substantive involvement in the first arbitration, Judge Marks found that the Orioles did not show "any denial of fundamental fairness based on MLB's support role or the informality of the procedures used." *TCR I* at *7. MLB's role should not have been a surprise in the first arbitration and certainly was not in the second one.

The Orioles' speculation as to whether MLB might have played a materially more significant role in the second arbitration is not sufficient to overturn the Second Award. *See U.S. Elecs.*, 17 N.Y.3d at 914-15; *797 Broadway Grp. LLC v. BCI Const., Inc.*, 57 Misc.3d 391, 401 (N.Y. Sup. Ct. Albany Cty. 2017) ("'a showing of evident partiality may not be based simply on speculation'") (quoting *Scandinavian Reinsurance Co., Ltd. v. St. Paul Fire and Marine Ins. Co.*, 668 F.3d 60, 72 (2d Cir. 2012)); *Siemens Transp. Partnership Puerto Rico, S.E.v. Redondo Perini Joint Venture*, 2006 WL 2660707 (N.Y. Sup. Ct. N.Y. Cty., Sept. 15, 2006) (rejecting claims of partiality based on "sheer speculation"); *Areca, Inc. v. Oppenheimer & Co.*, 960 F. Supp. 52, 57 (S.D.N.Y. 1997) (rejecting vacatur where petitioners had "not come forward with any direct and definite evidence of partiality").

Indeed, the evidence here is to the contrary. Presumably because of the controversy surrounding the First Award, the RSDC retained experienced legal counsel to assist it in in the second arbitration. Initially, that counsel was Sullivan & Cromwell. After the Orioles complained about that selection based on S&C's purported prior role in the matter, S&C voluntarily withdrew from the engagement more than five months before the arbitration hearing began. The RSDC then retained a new legal advisor, Gregory Joseph. Plainly, the RSDC had significantly more non-MLB support in connection with the second arbitration than it had with the first.

The Orioles' more substantial complaint is that MLB's Commissioner made public statements that the Orioles construe to evince a bias in favor of the Nationals. For example, they point to statements from the Commissioner suggesting that the Orioles engaged in conduct "designed to avoid [the 2005 Agreement] from being effectuated," and that "sooner or later" the Orioles "will be required to pay" the rights fees set forth in the First Award. NYSCEF 860 at 15.

The Court does find these kinds of statements troubling, particularly when made during the pendency of an arbitration (and litigation surrounding the arbitration) in which the MLB plays an important role. The plurality opinion in *TCR II* addressed similar allegations and found them insufficient to warrant removing the MLB-appointed RSDC from the arbitration process: "Nor does the fact that MLB has made certain public statements expressing the view that the RSDC acted within the scope of its authority in setting the rights fees, and that MASN would have to abide by that determination 'sooner or later,' warrant transfer to a new forum. Again, it is the RSDC, not MLB or its Commissioner that will render a final decision in this matter." *TCR II* at 158 (plurality). The Court is persuaded that, although it would certainly be prudent for MLB to be more circumspect in commenting on pending disputes that are the subject of MLB-sponsored arbitration, the stray public statements referenced by the Orioles are not sufficient to meet the Orioles' heavy burden of showing evident partiality, corruption, or fundamental unfairness that would require vacating the RSDC's award and sending the parties back for a third arbitration. The RSDC made the final decisions, with the assistance of experienced counsel and based on an exhaustive analysis of an extensive record. The Court does not believe that public statements such as those referenced by the Orioles are sufficient to throw into doubt the fairness of a process that was handled and resolved by the RSDC with obvious thoroughness and care.

b. <u>The Orioles Were Not Denied the Right to Present Their Case</u>

Next, the Orioles seek to vacate the award under Section 10(a)(3) of the FAA, which provides that an arbitral award may be vacated the ground that the "arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy." 9 U.S.C. § 10(a)(3). That section has been interpreted to require that arbitrators "give each of the parties to the dispute an adequate

opportunity to present its evidence and argument." *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997).

Even a cursory review of the voluminous record in this case shows that these parties have suffered through many things over the course of seven years, but one of them was ***not*** the absence of an adequate opportunity to present their evidence and arguments.

The Nationals correctly assert that most of the arguments raised by the Orioles boil down to an objection based on the RSDC's "failure" to permit more searching discovery into certain issues during the course of the arbitration, such as other RSDC evaluations the Orioles "[have] good reason to believe . . . exist." NYSCEF 860 at 21. Arbitrators are properly given broad discretion with respect to the scope of discovery. *See Matter of Merrill Lynch, Pierce, Fenner & Smith*, 198 A.D.2d 181, 181 (1st Dep't 1993) ("arbitrators' denial of appellant's request to produce millions of pages of unspecified documents, later reduced, cannot be characterized as misconduct in the sense of refusing to hear pertinent and material evidence"); *Abu Dhabi Inv. Auth. v. Citigroup, Inc*., 2013 WL 789642, at *9 (S.D.N.Y. Mar. 4, 2013), *aff'd*, 557 Fed. Appx. 66 (2d Cir. 2014); *Finklestein v. UBS Glob. Asset Mgmt. (US) Inc.*, 2011 WL 3586437, at *9 (S.D.N.Y. Aug. 9, 2011). A court should not "substitute its judgment for that of" the arbitrators, including on discovery issues. *New York State Corr. Officers*, 704 N.Y.S.2d at 914.

Notably, the 2005 Agreement did not provide a right to *any* discovery in a dispute regarding rights fees. See *TCR II* at 156 (plurality) ("there are no . . . discovery rights" in the agreement). If the parties wanted to provide for civil litigation-type discovery in connection with such disputes, they could have done so in the agreement. They did not. The record shows that the RSDC considered the Orioles' various discovery requests and rejected them in a formal,

reasoned order on the ground that they did not relate to the merits of the dispute, but instead they were intended to explore the impartiality of the RSDC.

The Orioles also argue that the arbitrators relied upon evidence – specifically, post-2005 Agreement communications with MLB - while at the same precluding the Orioles from countering that evidence with other communications from that same period. In fact, the only two post-Agreement communications discussed in depth in the Second Award are a 2010 letter offered by the Orioles and a 2011 letter offered by the Nationals, both of which were available to the parties during the arbitration. The fact that the panel did not permit unfettered discovery into other post-Agreement communications, upon which the panel did not rely, the content and relevance of which are speculative, does not provide a basis for vacating the award. As noted above, arbitrators have substantial discretion in regulating the scope of discovery. The record does not reveal any legitimate concern that the panel intentionally hobbled or interfered with the Orioles' ability to vigorously present or state its case, which it most certainly did.

c. <u>The RSDC Did Not Exceed Its Powers</u>

Finally, the Orioles' argument that the RSDC exceeded its powers by failing to correctly apply Maryland law in assessing the parties' respective positions under the contract is meritless. The inquiry under section 10(a)(iv) of the FAA is whether the arbitrators had the *authority* under the parties' agreement to *consider* an issue, not whether they correctly *decided* the issue. *Nat'l Union Fire Ins. Co. v. Pittsburgh, PA.*, 2005 WL 857352, at *4–5 (S.D.N.Y. Apr. 12, 2005). As Judge Marks observed, FAA § 10(a)(4) imposes "a heavy burden. 'It is not enough … to show that the [arbitrator] committed an error—or even a serious error. . . . So the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.'" *TCR I* at *5 (quoting *Oxford Health Plans LLC v. Sutter*, 569 U.S.

564, 569-571 (2013)). In this case, the RSDC obviously had the authority to consider the interpretation of relevant language in the agreement and the application of the facts to that language.

Although couched as a challenge to exceeding arbitral powers, the Orioles' argument in fact attempts to show that the RSDC acted with manifest disregard for the law. As noted above, "the manifest disregard standard does not permit review of the panel's interpretation of the parties' agreement even if that interpretation was erroneous." *Cantor Fitzgerald Secs.*, 83 A.D.3d at 592. The Orioles' arguments with respect to the RSDC's misapplication of Maryland law do not come close to the required showing that the RSDC exceeded its powers or showed manifest disregard for the law.

* * *

The Court has reviewed the Orioles' remaining arguments (mainly, sub-arguments of the above) and found them to be without merit.

3. <u>The Nationals Are Entitled to Prejudgment Interest</u>

Under CPLR §§ 5001-5004 the court may grant interest at a rate of 9% annually upon a "sum awarded . . . unless in an action of an equitable nature." "Upon confirmation of an arbitrator's award, interest should be awarded from the date of the award." *Shimon v. Silberman*, 92 A.D.3d 789; *Board of Ed. of Cent. School Dist. 1 of Towns of Niagara, Wheatfield, Lewistown and Cambria v. Niagara-Wheatfield Teachers Ass'n*, 46 N.Y.2d 553, 558 (1979).

The Second Award constitutes a monetary "sum awarded" upon which the court may grant interest. The Orioles argue that in cases where the arbitration award is declaratory in nature a court may not award prejudgment interest. NYSCEF 860 at 28-29. This is not the case here. The 2005 Agreement dictates that the Nationals and Orioles "shall be paid" annual rights

fees from RSN. NYSCEF 814 § 2.G. The monetary amount of the rights fees for 2005 through 2011 were listed in the contract. *Id.* The rights fees for 2012-2016 were subject to negotiation between the parties, and ultimately ended up in front of the RSDC for determination. *Id.* at 2.I, 2.J. The RSDC made its determination, which clearly was a monetary award of what "shall be paid" to the Nationals, down to the single dollar, subject only to deducting the amount previously paid by MASN to the Nationals in respect of the rights fees. The Nationals therefore are entitled to post-award prejudgment interest on the arbitration award.

The Orioles cite to *In re Gruber (Cortell Group, Inc.)*, 143 A.D.2d 39 (1st Dep't 1988), for the proposition that "on a motion to confirm an arbitration award, if the award is silent on the question of pre-judgment interest, a court is not entitled to award such interest." *Id.* at 40. The Second Award was not "silent" on the issue of prejudgment interest. Rather it simply determined that under the 2005 Agreement it did not have the *authority* to award such interest. *See Levin & Gladder, P.C. v. Kenmore Property*, LLC, 70 A.D.3d 443 (1st Dep't 2010) (finding that the court could not award pre-award interest when the arbitrators had the authority to do so and made no such award). The fact that the RSDC concluded that it did not have the authority to award prejudgment interest under the 2005 Agreement does not preclude this court from doing so in this proceeding.

The specific calculation of the amount that is subject to prejudgment interest will require deducting the amounts previously paid by MASN to the Nationals in respect of the rights fees. That calculation will be referred to a Judicial Hearing Officer ("JHO") for determination.

Therefore, it is:

ORDERED AND ADJUDGED that the motion by Respondent Washington Nationals Baseball Club, LLC (the "Nationals") to confirm the arbitration award is **GRANTED** and the award hereby is **CONFIRMED**; it is further

ORDERED that the parties are directed to an Inquest before a JHO or Special Referee to determine the amount of interest to which the Nationals are entitled; it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646–386–3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; it is further

ORDERED that the Nationals' counsel shall serve a copy of this order with notice of entry on the Orioles and that counsel for the Nationals shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212–401–9186) or email an Information Sheet (which can be accessed at http://www.nycourts.gov/courts/1jd/supctmanh/refpart-infosheet-10-09.pdf) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR § 4318) (the proceeding will be recorded by a court reporter, the

rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion.

This constitutes the decision and order of the Court.

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8/22/2019
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	X	**CASE DISPOSED**			**NON-FINAL DISPOSITION**			
	X	**GRANTED**		**DENIED**	**GRANTED IN PART**		**OTHER**	
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**			
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**	X	**REFERENCE**	